Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

No. 92-827

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAYMOND H. COPP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KEVIN M. BROWN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in enforcing an Internal Revenue Service summons without conducting an evidentiary hearing when petitioner failed to offer evidence in support of his allegation that the summons was issued for an improper purpose.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Alphin v. *United States*, 809 F.2d 236 (4th Cir.), cert. denied, 480 U.S. 935 (1987)	4
Chen Chi Wang v. *United States*, 757 F.2d 1000 (9th Cir. 1985)	3
Donaldson v. *United States*, 400 U.S. 517 (1971)	3
Hintze v. *IRS*, 879 F.2d 121 (4th Cir. 1989)	4
La Mura v. *United States*, 765 F.2d 974 (11th Cir. 1985).	6
Moutevelis v. *United States*, 727 F.2d 313 (3d Cir. 1984) .	7
Spalding v. *Spalding*, 94 N.W.2d 810 (Mich. 1959)	7
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7, 8
United States v. *Abrahams*, 905 F.2d 1276 (9th Cir. 1990)	6
United States v. *Balanced Financial Management, Inc.*, 769 F.2d 1440 (10th Cir. 1985)	4
United States v. *G. & G. Advertising Co.*, 762 F.2d 632 (8th Cir. 1985)	6
United States v. *Harris*, 628 F.2d 875 (5th Cir. 1980)	7
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982)	4, 8
United States v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975) .	5, 6
United States v. *Michaud*, 907 F.2d 750 (7th Cir. 1990) ..	7
United States v. *National Bank*, 622 F.2d 365 (8th Cir. 1980)	4

Cases—Continued: Page

United States v. *Samuels, Kramer & Co.*, 712 F.2d 1342 (9th Cir. 1983) 7
United States v. *Southeast First National Bank, Inc.*, 655 F.2d 661 (5th Cir. 1981) 7
United States v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985) 4
United States v. *Will*, 671 F.2d 963 (6th Cir. 1982) 3, 6
United States v. *Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976) 7

Statute:

Internal Revenue Code, 26 U.S.C. 7602 ..... 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-827

RAYMOND H. COPP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-37) is reported at 968 F.2d 1435. The order of the district court (Pet. App. A62-A65) enforcing the IRS summons is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1992. The petition for a writ of certiorari was filed on October 13, 1992 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the course of an investigation into the income tax liabilities of petitioner for taxable years 1985 through 1989, Internal Revenue Agent Ernest Van Loan issued a summons to Goldman Sachs & Co., with whom petitioner had engaged in financial transactions (Pet. App. 28). The summons was issued pursuant to 26 U.S.C. 7602 and directed Goldman Sachs & Co. to appear, give testimony and produce documents relevant to the determination of petitioner's tax liabilities for the years in question (Pet. App. 28).

2. Petitioner filed a petition to quash the summons, contending that it was improper for the summons to be served after the IRS had referred the matter to the Justice Department for criminal investigation (Pet. App. 28). Without holding an evidentiary hearing on petitioner's allegations, the district court rejected petitioner's contention. Based upon the uncontradicted affidavit of Internal Revenue Agent Van Loan, the court found that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the [taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed." *Id.* at 33-34.

3. The court of appeals affirmed (Pet. App. 24-37). The court held that petitioner did not establish that the district court committed clear error in finding that the IRS had not abandoned pursuit of petitioner's civil tax liability. Since the IRS is entitled to enforcement of its summons where determination of

civil tax liability is at least one of its purposes, the court upheld the enforcement order (*id.* at 32-34).

The court of appeals also rejected petitioner's argument that the district court abused its discretion in enforcing the summons without conducting an evidentiary hearing (Pet. App. 36 n.1). The court explained that petitioner did not offer any evidence in support of his allegations and thus failed to make a sufficient threshold showing that there was an improper purpose behind the summons (*ibid.*). The fact that a different district court judge, in a proceeding on a different summons, had allowed petitioner to proceed to an evidentiary hearing on the same allegations did not establish that it was an abuse of discretion for the district court to decline to do so in this case (*ibid.*).

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in enforcing the summons without conducting an evidentiary hearing. The decision in this case does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Summons enforcement proceedings are designed to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971).[1] While a district court may, in the exercise of its discretion, allow the

---

[1] It is well settled that district courts may limit discovery in such proceedings. See *Chen Chi Wang* v. *United States*, 757 F.2d 1000, 1004 (9th Cir. 1985); *United States* v. *Will*, 671 F.2d 963, 967-968 (6th Cir. 1982).

taxpayer an evidentiary hearing to substantiate his allegations and supplement offers of proof that the summons was not issued in good faith, the "right to a[] * * * hearing * * * is not absolute." *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989). Whether an evidentiary hearing should be conducted in the course of summons enforcement proceedings "is a matter committed to the sound discretion of the district court. There is no requirement that the court conduct such a hearing or permit discovery in each and every case. * * * [A] party challenging IRS summonses will be entitled to an adversary hearing only upon the production of some substantive evidence corroborating the claim of abuse." *Ibid.* See also *Alphin* v. *United States*, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987); *United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) (taxpayer must factually refute the government's showing or support a proper affirmative defense before evidentiary hearing is granted); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983) (only where a taxpayer has made "a 'substantial preliminary showing' " of abuse of process is he entitled to an evidentiary hearing), aff'd, 469 U.S. 310 (1985); *United States* v. *Kis*, 658 F.2d 526, 539 n.39 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) ("This hearing is not, however, automatic. * * * [T]he taxpayer must make some threshold showing to be entitled to the hearing."); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the

summons proceedings are raised by the party challenging the summons.").

Petitioner's reliance (Pet. 18-19) on the Third Circuit's opinion in *United States* v. *McCarthy*, 514 F.2d 368 (1975), is misplaced. In *McCarthy*, the court explained that "not every summons enforcement proceeding will require an evidentiary hearing * * * [and] if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required; the matter can be decided on the pleadings." *Id.* at 373. Although the Third Circuit afforded the taxpayer an evidentiary hearing in *McCarthy*, it did so only after concluding that the allegations raised "the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith" and the "defendant's allegations sufficiently raised the possibility that enforcement of the summons would result in a [prohibited] second inspection." *Id.* at 375-376. By contrast, the district court in this case, after reviewing an uncontroverted affidavit signed by the Internal Revenue Agent in charge of the investigation, specifically found that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the [taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed" (Pet. App. 33-34). Since petitioner failed to offer any evidence to contradict that affidavit, there was no

need for a hearing even under the test described by the Third Circuit in the *McCarthy* case.

Petitioner's reliance (Pet. 20-21) on the Sixth Circuit's decision in *United States* v. *Will*, 671 F.2d 963 (1982), is also misplaced. In *Will*, the court explained that "defining the permissible scope of the hearing is a decision left to the discretion of the district court * * * [and if the] court concludes that it cannot fairly decide the case on the evidence before it, the court is free to direct such further proceedings as its discretion dictates; conversely, if the evidence is sufficient, no further hearing is needed." *Id.* at 968 (citing *United States* v. *McCarthy*, *supra*). In the present case, the district court properly concluded that it could fairly decide the case on the basis of the government's affidavit and that no other relevant proof had been offered to warrant an evidentiary hearing.[2]

---

[2] Even if (contrary to fact) the IRS had been seeking information for a criminal purpose, the 1982 amendments to Section 7602 of the Code would entitle the IRS to enforcement of the summons under such circumstances. See, *e.g.*, *United States* v. *Abrahams*, 905 F.2d 1276, 1280-1281 n.4 (9th Cir. 1990) (although the "civil/criminal distinction was once critical, * * * [t]he 1982 enactment of § 7602(b) * * * broadened the summons power to include 'any offense connected with the tax laws' and thereby rendered the distinction irrelevant"); *La Mura* v. *United States*, 765 F.2d 974, 980 n.9 (11th Cir. 1985) ("Congress amended the tax code to provide a clear definition of when a tax investigation has become solely criminal in nature."); *United States* v. *G. & G. Advertising Co.*, 762 F.2d 632, 634 n.1 (8th Cir. 1985) ("The requirement that the summons not issue for a solely criminal investigation * * * has been negated by the 1982 amendment to § 7602(b) which allows inquiry into 'any offense,' so long as the case has not been

2. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985); *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342, 1348 (9th Cir. 1983); *United States* v. *Southeast First National Bank, Inc.*, 655 F.2d 661, 668 (5th Cir. 1981); *United States* v. *Harris*, 628 F.2d 875, 883-884 (5th Cir. 1980); *United States* v. *Wright Motor Co.*, 536 F.2d 1090, 1094 & n.1 (5th Cir. 1976). "In order to have an 'abuse' [of discretion] in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Ibid.* (quoting *Spalding* v. *Spalding*, 94 N.W.2d 810, 811 (Mich. 1959)).

Petitioner failed to offer any evidence of deficiencies in the summons process. Nevertheless, he maintains that he was entitled to an evidentiary hearing so that he could show that the IRS issued the summons solely to pursue a criminal investigation, and that it should therefore be quashed. In support of this argument petitioner alleges (Pet. 13) that several facts—including the alleged expansion of the audit to include taxable years outside of 1988 and the refusal of the IRS conditionally to accept a portion of requested additional documents—constitute evidence

---

turned over to the Justice Department."); *Moutevelis v. United States*, 727 F.2d 313, 314-315 (3d Cir. 1984) (same). Because of their alternative disposition of this case, the courts below did not need to, and did not, reach that issue here. Cf. *United States* v. *Michaud*, 907 F.2d 750, 752 n.2 (7th Cir. 1990).

of an improper purpose on the part of the IRS. This contention is baseless. As the court of appeals correctly explained, petitioner "has not * * * demonstrated how these facts, none of which are inconsistent with a civil audit, suggest an improper purpose" (Pet. App. 35).

There is no requirement that an evidentiary hearing be held when a taxpayer does not "develop facts from which a court might *infer a possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d at 540. The courts below correctly concluded that petitioner failed to meet that requirement in this case. The district court thus did not abuse its discretion in disposing of this case without an evidentiary hearing. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 324 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KEVIN M. BROWN
Attorneys

JANUARY 1993